Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

HORACE SHAW, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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140 pp

QUESTIONS PRESENTED

(1) Did the Maryland Court of Appeals improperly determine reasonable articulable suspicion existed under the facts of the instant matter, and in doing so, create a standard wherein factors such as "extreme nervousness" and "overwhelming" odors cannot be properly judicially reviewed?

(2) Did the Maryland Court of Appeals improperly find probable cause to search existed in the instant matter and fail to consider whether and/or when probable cause, if it existed at all, dissipated?

PARTIES

In addition to the parties set forth in the caption to this writ, a list of all parties to the proceeding below whose judgment is the subject of this petition is as follows:

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Hagerstown, Maryland 21746
1-301-733-2800

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The Petitioner, Horace Shaw, Jr., respectfully prays this Honorable Court grant a writ of certiorari to review the judgment and opinion of the Maryland Court of Appeals entered on August 29, 2002.

OPINIONS BELOW

The August 29, 2002, opinion of the Maryland Court of Appeals,[1] which is reported at *Nathan v. State of Maryland*, 370 Md. 648, 805 A.2d 1086 (Md. 2002).[2], is set out at pages 1a-20a of the Appendix to this petition. (Petitioners' Appendix A). The dissent to the opinion of the Maryland Court of Appeals is set out at pages 21a-40a of the Appendix to this petition. (Petitioners' Appendix A).[3]

The June 05, 2001, opinion of the Maryland Court of Special Appeals, which was not officially

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[1] The Maryland Court of Appeals Order, dated October 08, 2002, denying, without comment, the Petitioner's request to reconsider is set out page 100a of the Appendix to this Petition. (Petitioners' Appendix E).

[2] Petitioner refers to the case as *Nathan v. State of Maryland* because in the official citation it is noted as such. The reason for this is the Maryland Court of Appeals issued one (1) opinion in conjunction with the separate appeals of the Petitioner and Corinthius Nathan, the other individual in the vehicle with Petitioner.

[3] The Order granting the State of Maryland's writ of certiorari to the Maryland Court of Appeals in this matter, reported at *State of Maryland v. Shaw*, 365 Md. 266, 778 A.2d 382 (Md. 2001)., was dated August 15, 2001, and is set out at pages 97a-99a of the Appendix to this petition (Petitioner's Appendix D).

reported but noted here as *Horace Shaw, Jr., v. State of Maryland*, 282, September Term, 2000 (Md. Ct. Spec. App., June 05, 2001)., is set out at pages 41a-66a of the Appendix to this petition. (Petitioners' Appendix B). The dissent to the opinion of the Court of Special Appeals of Maryland is set out at pages 67a-73a of the Appendix to this petition. (Petitioners' Appendix B).

The written opinion, which was also not officially reported, of the Honorable Daniel M. Long, of the Circuit Court for Somerset County (sitting in Wicomico County by designation), dated March 09, 2000, is set out pages 74a-96a of the Appendix to this petition. (Petitioners' Appendix C).

GROUNDS FOR JURISDICTION

The Petitioner is Horace Shaw, Jr. The Respondent is the State of Maryland.

The jurisdiction of this Honorable Court is invoked in the instant matter, reported as *Nathan v. State of Maryland*, 805 A.2d 1086 (Md. 2002), pursuant to 28 U.S.C. § 1257(a). The Maryland Court of Appeals decided the case on August 29, 2002. Subsequently, a timely rehearing/reconsideration was sought by Petitioner, Horace Shaw, Jr. The Petitioner's request for reconsideration was denied, without comment by the Maryland Court of Appeals, on October 08, 2002. No extension has been requested, or granted, with regards to the time in which this Petition is to be filed.

An issue, sufficiency of the evidence to sustain the trial level conviction, unrelated to the issues raised for review in this petition was remanded to the Maryland Court of Special Appeals, the State of Maryland's intermediate Appellate Court, for consideration.[4] This issue is still pending before the Maryland Court of Special Appeals.

CONSTITUTIONAL PROVISIONS

This case involves the fourth Amendment to the Constitution of the United States of America, which provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things seized.

The Fourth Amendment to the Constitution of the United States of America is applicable to the State of Maryland[5] through the so-called "incorporation clause" of Section 1 of the Fourteenth Amendment of

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[4] The Maryland Court of Special Appeals previously did not rule on this issue because it found the search and seizure issue raised by the Petitioner, Horace Shaw, Jr., required reversal. (Pet. App. 42a).

[5] *See; Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

the Constitution of the United States of America which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection under the laws."

STATEMENT OF THE CASE

The underlying case stems from the arrest, and subsequent conviction of the Petitioner, Horace Shaw, Jr. (hereinafter, "Shaw" or "the Petitioner"). The arrest of Shaw took place on July 14, 1999, and was the result of a traffic stop. The traffic stop was initiated for a minor violation (speeding) of the traffic laws of Maryland. (Pet. App. 77a). The traffic stop culminated with the interior ceiling panels of a van Shaw was a passenger in being ripped apart by a Maryland State Trooper, Sgt. Mike Lewis. At the time of this extremely invasive search, Shaw was sitting on the side of the road, in handcuffs, guarded by Maryland State Trooper, Tfc. Robert Penny.

Prior to trial Shaw timely filed a Motion to Suppress. A hearing on Shaw's Motion to Suppress was held on November 05, 1999. Briefs, and associated materials, on the issues argued at the hearing were submitted for consideration by the court, at the court's request, after the hearing. In a written opinion, dated March 09, 2000, Shaw's Motion to Suppress was denied by the Honorable Daniel M. Long, of the Circuit Court for Somerset County (sitting in Wicomico County by designation). Judge Long found probable cause existed for the search in the instant case based the detaining officers' observations of the Petitioner, the individual driving the vehicle the Petitioner was in and the vehicle itself. (Pet. App. 89a-93a).

On March 20, 2000, Shaw was tried and found guilty by a jury, presided over by the Honorable D. William Simpson (of the Circuit Court of Wicomico County). On March 28, 2000, the afore-mentioned Judge Simpson sentenced the Petitioner to a term of incarceration totaling twenty-five (25) years, fifteen (15) of those years without the possibility of parole. (Pet. App. 43a, 44a).

An appeal of the conviction was timely noted with the Maryland Court of Special Appeals wherein the Petitioner raised a number issues including the issues advanced in this Petition. (Pet. App. 50a-66a). In an unreported opinion dated June 05, 2001, the intermediate appellate court reversed the decision of

the trial court ruling the detaining officers observations of the vehicle seized, when combined with his observations of the Petitioner did not warrant a finding of probable cause to search. (Pet. App. 50a-66a).

The State of Maryland sought review of the Maryland Court of Special Appeals ruling in this matter by way of a Petition for writ of certiorari to the Maryland Court of Appeals. The Maryland Court granted said Petition on August 15, 2001. (Pet. App. 97a-99a).

On August 29, 2002, the Maryland Court of Appeals reversed the decision of the intermediate appellate court in a written opinion. The Maryland Court of Appeals found probable cause existed to search in the instant matter based on the detaining officer's observations that Petitioner and the driver acted suspiciously[6] and said officer's belief the vehicle the Petitioner was traveling in contained a secret compartment. (Pet. App. 17a).

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[6] The suspicious activity the Maryland Court of Appeals referred to was based on the following factors: the fact that the driver of the vehicle was unable to produce identification, the driver's and Shaw's "extreme nervousness," Shaw's apparent pretense of sleep when the vehicle was initially stopped, the driver's evasive answers about his travel plans, inconsistent travel versions of vehicle's journey, the "overwhelming" odor of air freshener and alterations to the vehicle. (Pet. App. 15a).

The circumstances surrounding the Petitioner's arrest, the pertinent underlying facts of the case, are as follows;[7] On Wednesday, July 14, 1999, at approximately 8:15 p.m., Shaw was a passenger in a conversion van[8] driven by Corinthius Nathan (hereinafter "Nathan" or "the driver"). (Pet. App. 77a). At the time of the stop, Shaw was lying down in the rear of the van. (Pet. App. 78a). Sgt. Mike Lewis (hereinafter, "Sgt. Lewis" or "the detaining officer"), a Maryland State trooper, testified he paced the van traveling 70-71 miles per hour in a posted 60 mile per hour zone. While the trooper was "pacing" the van, the vehicle allegedly drifted onto the shoulder. As a result, Sgt. Lewis activated the cruiser's police lights and initiated a traffic stop. Sgt. Lewis also reported one of the van's brake lights was out and, he thought, the van took too long to stop. (Pet. App. 77a).

After the van stopped, Sgt. Lewis approached the van on the passenger's side and spoke to the driver,

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[7] The facts surrounding the vehicle stop and the events subsequent thereto were largely undisputed at all stages of the proceedings below because the entire incident was video taped (with sound). (Pet. App. 76a). An outline of the videotape was prepared by Petitioner for the lower courts and submitted to said courts at every level of the proceedings below. *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

[8] The conversion van in this case is a 1988 Dodge Ram Van with a raised roof, working television and working video game system. (Pet. App. 77a).

Nathan. Sgt. Lewis informed Nathan of the reason for the stop and asked Nathan for his license and registration. Nathan could not produce a driver's license. Sgt. Lewis inquired about passengers in the van; at which time Shaw moved to the front of the van. Sgt. Lewis requested Shaw's information and Shaw provided his (Shaw's) driver's license and the registration card for the van. Sgt. Lewis kept Shaw's license and the registration. (Pet. App. 77a, 78a). **Sgt. Lewis ordered Shaw to "sit tight"** and requested Nathan step out of the vehicle and onto the shoulder of the road. Sgt. Lewis questioned Nathan regarding his (Nathan's) identity[9] and matters unrelated to the traffic stop, such as the origin and destination of the van's trip. (Pet. App. 78a). Sgt. Lewis subsequently patted Nathan down for officer safety.

After speaking with Nathan, and before Sgt. Lewis questioned Shaw, Sgt. Lewis believed criminal activity was afoot. Sgt. Lewis expressed the reasons for his suspicions as being Nathan's lack of identification, chest palpitations, trembling hands and carotid artery pulsing. (Pet. App. 78a). Sgt. Lewis returned to the van to interrogate Shaw separately about the van and the trip. Nathan was left on the side of the road in between the van and police cruiser watched by Maryland State Trooper Tfc. Robert Penny (hereinafter, "Tfc. Penny"). Sgt. Lewis testified Nathan's version of

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[9] Sgt. Lewis obtained Nathan's full name, date of birth and social security number

the van's journey differed from Shaw's and Shaw appeared nervous. (Pet. App. 79a). Sgt. Lewis further testified when he spoke to Shaw, he (Sgt. Lewis) spoke in a low tone so Nathan could not hear what was being said.

Sgt. Lewis requested Shaw consent to a search of the van for guns and drugs, stating: **"We have a big problem with guns and drugs up and down this highway. I'm getting ready to get a bit to eat but I was going to check another vehicle real quick. Do you mind if I check the vehicle for guns and drugs real quick and I'll have you guys on your way. We check them all the time."** (Pet. App. 50a). Shaw submitted to Sgt. Lewis' request. (Pet. App. 55a). Sgt. Lewis asked Shaw to exit the vehicle and patted Shaw down for weapons (officer safety). (Pet. App. 79a). No weapons or contraband were discovered and Shaw was directed to the side of the road near Nathan. Shaw and Nathan were then guarded by Tfc. Penny.

Sgt. Lewis entered the van and conducted his first search of the vehicle. Sgt. Lewis then exited the vehicle and returned to his patrol car. Three (3) times Sgt. Lewis entered the van and searched it without finding any guns or drugs. On at least one (1) of these occasions, Sgt. Lewis entered the van with a screwdriver. (Pet. App. 79a). Sgt. Lewis admitted when he took the screwdriver from his cruiser to the van, he (Sgt. Lewis) intentionally kept the screwdriver hidden from Shaw and Nathan. (Pet. App. 56a).

Before entering the vehicle a fourth time, and **more then eight (8) minutes after the stop was initiated,** Sgt. Lewis told Shaw and Nathan he (Sgt. Lewis) would have the detainees on their way shortly and finally starts calling in (to the dispatcher) the information obtained from Shaw and Nathan. Before receiving any answer on the information, Sgt. Lewis then informed Shaw and Nathan the tags on the vehicle were stolen. Sgt. Lewis knew this statement was untrue. At this time, Sgt. Lewis **handcuffed** Shaw and Nathan on the basis of the van's "stolen tags". **Sgt. Lewis was admittedly lying** to Shaw and Nathan. (Pet. App. 57a, 58a). **Sgt. Lewis had no information disputing the suspect's valid ownership of the van prior to the arrest and handcuffing.** Shaw and Nathan were ordered to sit on the ground, and were again guarded by Tfc. Penny.

Sgt. Lewis then told Shaw he (Sgt. Lewis) would tear open the ceiling if Shaw did not reveal how to open the suspected compartment. Shaw replied, "I don't know what you are talking about." (Pet. App. 59a). Sgt. Lewis then entered the van a fourth and fifth time. Sgt. Lewis searched around the front of the van, but did not search any of the baggage in the vehicle. Sgt. Lewis then began tearing at the front overhead console (map light, etc.) with a claw hammer.[10] After

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[10] Sgt. Lewis testified at the suppression hearing that he had recently found a secret compartment in a conversion van where the entrance to the compartment had been behind the front overhead console. Sgt. Lewis further testified that he tore down

pulling said console down and **finding nothing**, Sgt. Lewis noted he could not believe it, that is where he (Sgt. Lewis) thought the compartment would be located. Sgt. Lewis then began tearing apart the panel holding a working television. After forcibly removing the panel holding the television, Sgt. Lewis recovered narcotics from a space behind the panel. The narcotics were found **roughly nineteen (19) minutes** after the initial traffic stop. (Pet. App. 80a). No citations were issued at the scene of the stop.[11]

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

The Maryland Court of Appeals improperly determined reasonable articulable suspicion existed in the instant matter, and in doing so, created a standard wherein factors such as extreme nervousness and overwhelming odors cannot be judicially reviewed.

The stop of an automobile and detention of its occupants constitutes a "seizure" for Fourth

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the front overhead console in the present case expecting to find an entrance to a secret compartment Finding nothing, Sgt. Lewis then forcibly pulled down the panel holding the van's television and video game system, which was located behind the van's front seats.

[11] The driver of the van, Nathan, was given a citation later at the station.

Amendment analysis even when purpose of the stop is limited (i.e. to issue a traffic citation) and the actual detention time is brief. *See; Whren v. United States*, 517 U.S. 806 (1996).

It is clear from the inception of the traffic stop at issue in this case the Petitioner was detained. This Honorable Court has stated, "In order to determine whether a reasonable person would have felt free to disregard the police... it is necessary to focus on what the person's 'business' was; only then may we determine if the police questioning and conduct at issue would likely have impeded that person's freedom to proceed with such business." *See; Michigan v. Chesternut*, 486 U.S. 467, 578, (1988); *Florida v. Bostick*, 501 U.S. 434 (1991); *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 218 (1984).

In the instant matter, Shaw's "business" was to continue on his way down the interstate to his ultimate destination. With the driver of Shaw's detained vehicle being held at a police cruiser by an armed uniformed officer, and Sgt. Lewis holding Shaw's license, it was impossible for Shaw to "go about his business." More Importantly, Sgt. Lewis ordered Shaw to "sit tight." Under these circumstances, it is unreasonable to think Shaw, a black out-of-state suspect, would feel free to walk away form the officers down an interstate highway and leave his means of travel, his license, registration and companion behind. Under the totality of the circumstances Shaw was simply not free to leave.

Under the facts of this case, no reasonable person in Shaw's position would believe he/she could "just walk away" from two (2) armed police officers. It is clear Petitioner was detained, for the purposes of constitutional analysis, from the moment Sgt. Lewis told Shaw to "sit tight," and stopped investigating the traffic stop to interrogate Shaw on unrelated matters. Therefore, in order to justify the continued detention[12] of the Petitioner, Sgt. Lewis required either a valid consent to search or, at a minimum, reasonable articulable suspicion. *See; Terry v. Ohio*, 392 U.S. 1 (1968).[13]

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[12] The Petitioner does not contend his initial detention, based on the stop of vehicle for a violation of the traffic laws, was improper. Rather, Petitioner addresses his continued detention on a matter unrelated to the traffic stop. *See; United States v. Sharpe*, 470 U.S. 675 (1985); *Florida v. Royer*, 460 U.S. 491 (1983).

[13] Petitioner is mindful of the fact he (Petitioner) purportedly consented to a "real quick" search of the vehicle detained. Petitioner, however, addresses the issues presented herein in this matter because the Maryland Court of Appeals determined reasonable suspicion ripening into probable cause and exigent circumstances justified the search of the vehicle, it did not discuss at any length the consent issue. (Pet. App. 4a). Therefore, the Maryland Court of Appeals did not treat this matter as a consent issue. Furthermore, the Maryland Court of Appeals specifically declined to rule on the issue of whether the nature and scope of any consent validly given was exceeded by Sgt. Lewis' extremely invasive search. (Pet. App. 16a). If this Honorable Court were to grant the relief sought herein and ultimately determine no probable cause to search existed, Petitioner asserts this matter would have to be remanded back to the Maryland Court of Appeals for a finding of whether any validly received consent was exceeded.

This Honorable Court recently discussed the concept of reasonable articulable suspicion in *United States v. Arvizu*, 534 U.S. 266 (2002). In *Arvizu*, this Court again re-iterated that in making reasonable suspicion determinations, courts must look at the totality of the circumstances of each individual case to determine whether a detaining officer has a particularized and objective basis for suspecting wrongdoing.[14]

In the present case, the Maryland Court of Appeals determined Sgt. Lewis had a reasonable suspicion based on the following factors: the fact that the driver of the vehicle was unable to produce identification, the driver and Shaw's "extreme nervousness," Shaw's apparent pretense of sleep (when the vehicle was initially stopped), the driver's evasive answers about his travel plans, inconsistent travel versions of vehicle's journey, the "overwhelming" odor of air freshener and alterations to the vehicle.[15] (Pet. App. 15a). Looking at these

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[14] In *Arvizu*, this Honorable Court again declined to provide a detailed definition of reasonable suspicion. Rather, the Court noted the likelihood of criminality needs to be rooted in more than a mere hunch, but need not rise to the level of probable cause.

[15] A review of Sgt. Lewis' searches and detentions from January of 1995 through September of 1999, from Sgt. Lewis's Form 130s (Form 130s are reports of every search conducted by the Maryland State Police.) indicates Lewis relied on one or more of these factors to justify 114 of the 147 automobile searches he conducted during that period (74% of the time). Interestingly, of the 114 times Lewis relied on these factors to justify the search, Sgt. Lewis failed to

factors under the totality of the circumstances, it is clear Sgt. Lewis did not have a particularized and objective belief that the Petitioner was involved in any wrongdoing (either possession of guns or narcotics).

Initially, Petitioner points out the Maryland Court of Appeals should have not imputed any factors involving the driver of the vehicle to a reasonable suspicion analysis of the Petitioner. The findings that driver of the vehicle was evasive regarding his travel plans, gave a different travel itinerary than the Petitioner, the driver's "extreme" nervousness and the driver's inability to produce identification simply have no bearing on whether the officer developed a justifiable reason to detain the Petitioner. If anything, the fact the Petitioner was able to produce

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find drugs or contraband 84 times (70% of time). On those occasions when Sgt. Lewis did find drugs, 16 times other, more obvious, indicators of criminality (i.e., smell or sight of drugs, rental car violations, arrestable traffic offenses, "wanted" occupant, etc.) were present. Based on Sgt. Lewis's past experience, Sgt. Lewis was aware nervousness, etc., are not reliable indicators of criminality. *See;* Memorandum Exhibit B at suppression level, set out here as pages 106a-107a of the Appendix to this petition. (Petitioners' Appendix F). Sgt. Lewis' repetitive use of these factors in the great majority of his (Sgt. Lewis') vehicle searches indicates these observations are mere pretense to justify a search. Interestingly, Tfc. Penny, the officer who guarded Shaw and Nathan, did not notice any physical factors noted by the Sgt. Lewis, and the Maryland Court of Appeals accepted, to justify the continued detention of Shaw and Nathan (as well as, the search of the seized vehicle).

identification and provided the officer with the vehicle's information should have weighed in Shaw's favor under the totality of the circumstances.

Similarly, Shaw's asserted pretense of sleep adds little to an analysis of reasonable suspicion. There is no way the officer could know whether Shaw had been asleep before the initial stop in this case. More importantly, Petitioner can find no reasonable basis for this assertion entering the required analysis. Shaw did not attempt to hide from the officer, voluntarily moved to the front of the seized vehicle and complied with Sgt. Lewis' every direction. If Sgt. Lewis was concerned for his safety, this concern obviously quickly dissipated. Sgt. Lewis did not immediately ask the Petitioner to exit the vehicle, or search the Petitioner for a weapon, as was his right to do.[16] Furthermore, Sgt. Lewis left the Petitioner in the vehicle while he removed the driver for questioning.

The Maryland Court of Appeals characterization that Shaw was "extremely" nervous was also an insufficient basis upon which to build reasonable suspicion. Petitioner acknowledges this Honorable Court has found types of nervous, evasive, behavior pertinent in the consideration of reasonable suspicion. For example, In *Illinois v. Wardlow*, 528 U.S. 119 (2000)., this Court found a suspect's running away from law

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[16] *See; Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408 (1997).

enforcement officers, in conjunction with the suspect's presence in an area known for narcotics sales, was sufficient to establish reasonable articulable suspicion.[17] In the instant case, however, Shaw did not exhibit the same type of evasive behavior found in *Wardlow*. Rather, in the instant case the Petitioner was the victim of a far more subjective standard. In this matter, the allegation against Shaw was that he merely acted "extremely" nervous.

Prior to ruling on the instant case, the Maryland Court of Appeals addressed the issue of nervousness in *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (Md. 1999). In finding nervousness, or the lack thereof, wanting as a basis of reasonable suspicion, the Maryland Court of Appeals noted:

> suspicion based on nervousness is unjustified and cannot support detention of a suspect. As Judge Sonner stated in *Whitehead v. State*: "nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen . . . from the nervousness

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[17] In *Wardlow*, however, this Honorable Court declined to create a *per se* nervousness rule.

of a criminal who traffics in narcotics." 116 Md. App. 497, 698 A.2d 1115 (1997).

-*Ferris*, 355 Md. at 388.

Petitioner urges this Honorable Court to adopt the view nervousness espoused in *Ferris* and treat claims of "extreme" nervousness with even more caution. Petitioner asserts it is impossible for a law enforcement officer to either assess, or determine, an individual's nervousness level (especially when, as in the instant matter, the law enforcement officer has had no previous contact with the individual) in such a general sense.

The clear suggestion by the Maryland Court of Appeals is that while nervousness is of limited use in the determination of reasonable suspicion under a given set of facts, "extreme" nervousness, as determined by a law enforcement agent and not the court, is highly relevant in the analysis of reasonable suspicion. Permitting law enforcement officers to make determinations such as this, the level and/or character of a detainee's nervousness, effectively removes the role of judicial review.

Petitioner asserts, it is a vastly different circumstance when law enforcement officers observe an individual evasively running away from them in a high-drug area, as was the case in *Illinois v. Wardlow*, compared to a law enforcement officer merely

testifying, as in the instant case, that in his/her opinion the suspects appeared "extremely nervous." In the first case, the suppression court is given circumstances upon which it can exercise its role as an independent fact finder, in the latter case (the instant matter) the same court cannot. The reason; in the first case (based on *Illinois v. Wardlow*), the suppression court can examine the facts; that the suspect was in a high drug area, observed law enforcement agents and ran away, and make an independent evaluation under the totality of the circumstances. In the instant case, the suppression court will now pre-suppose, at a minimum, reasonable suspicion because a law enforcement officer characterizes nervousness as "extreme" whether said officer has any basis (either through past experience with the suspect or some type specialized training) for that finding or not.[18]

Quite simply, giving credence to law enforcement observations concerning the subjective character and nature of a suspect's nervousness will permit those same law enforcement officials to establish reasonable suspicion and/or probable cause based on nothing more than the clever use of adjectives and/or adverbs. Petitioner asserts such a situation would effectively replace the rule of law with the rule

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[18] No scientifically based evidence was offered at any level of these proceeding to demonstrate observations of nervousness are indicative of criminal behavior. Petitioner notes, however, Sgt. Lewis testified there are types of nervousness that indicate criminal activity.

of men and render the Fourth Amendment to the Constitution of the United States meaningless.

The Maryland Court of Appeals also found reasonable suspicion existed in the instant matter, in combination with the other factors discussed herein, due to the presence of air fresheners in the vehicle detained. Specifically, the Maryland Court of Appeals seemed concerned with the fact the detaining officer, Sgt. Lewis, was "overwhelmed" with the odor of air freshener in the vehicle detained.

Initially, Petitioner notes four (4) air fresheners were located in the detained vehicle, a full size van.[19] Two (2) of the air fresheners were located in the front of the van and two (2) were located in the rear of the van. Shaw states, the presence of air fresheners in and of itself is meaningless to a determination of reasonable suspicion and/or probable cause. The mere presence of air fresheners could never lead to more than a mere hunch, even if combined with other relevant factors. Certainly, however, Petitioner acknowledges the number of air fresheners in a vehicle, or their positioning, could possibly create a relevant factor for consideration in an individual case. For example, if a compact vehicle contained a large quantity of air fresheners, Petitioner concedes this information

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[19] To be specific, the vehicle was a 1988 Dodge Ram Van with a raised roof and working entertainment system (television and video game system).

combined with other pertinent factors could lead to a reasonable suspicion.

In the instant case, as was the case with "extreme" nervousness already discussed herein, the Maryland Court of Appeals again ceded the relevant importance of the presence of air fresheners to the detaining officer.

The Maryland Court of Appeals did not find the presence, number or position of air fresheners important to the reasonable suspicion determination, rather the Maryland Court of Appeals found it pertinent that the detaining officer was "overwhelmed" by the odor of air freshener. Petitioner states this type of highly subjective determination confers a level of discretion to police not grounded in any legitimate expertise and assures a finding not susceptible to any meaningful judicial review.

Under the ruling in the instant case the Maryland Court of Appeals again conducted no independent analysis[20] and blindly accepted the characterization of Sgt. Lewis.[21]

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[20] In *Ornelas v. United States*, 517 U.S. 690 (1996)., this Honorable Court noted reviewing courts must view the facts observed by law enforcement agents from the point of view of a reasonable police officer.

[21] The obvious inference Sgt. Lewis wanted drawn from his feeling/sensation of being "overwhelmed" by the odor of air freshener was the one the Maryland Court of Appeals found, that

Again, permitting determinations based on such a subjective observation will permit law enforcement officials to establish reasonable suspicion and/or probable cause based on nothing more than the colorful use of the English language. Petitioner asserts such a situation renders judicial review nothing more than a rubber stamp for law enforcement.[22]

For all of these reasons, the Maryland Court of Appeals improperly found reasonable articulable suspicion existed for the continued detention of the Petitioner.[23]

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the passengers of the vehicle detained were attempting to hide something.

[22] Petitioner addresses the issue of the alteration to the vehicle in question in the section of this brief dealing with probable cause because the van alteration was the ultimate factor in the determination of probable cause in the instant matter.

[23] Justice Marshall, with whom Justice Brennan joined in the dissent in *United States v. Sokolow*, 490 U.S. 1, (1989), provides the appropriate language to appreciate the absurdity of Sgt. Lewis's "suspicions" in the instant matter and the Maryland Court of Appeals reliance on them:

> Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." Compare, e.g., *United States v. Moore*, 675 F.2d 802, 803 (CA 6 1982, *cert. denied*, 460 U.S. 1068 (1983) (suspect was first to deplane), with *United States v. Mendenhall*, 446 U.S. 544, 564, (1980) (last to deplane, with

The Maryland Court of Appeals improperly found probable cause existed in the instant matter and did not consider whether and/or when probable cause, if it existed at all, dissipated.

United States v. Buenaventura-Ariza, 615 f.2d 29, 31 (CA2 1980) (deplaned from middle); *United States v. Sullivan*, 625 F.2d 717, 7210 (CA6 1980) (one-way tickets), with *United States v. Craemer*, 555 F.2d 594, 595 (CA6 1977) (round-trip tickets), with *United States v. McCaleb*, 552 F.2d 717, 720 (CA6 1977) (non-stop flight), with *United States v. Sokolow*, 808 F.2d 1366, 1370 (CA9 1987), *vacated* 831 F.2d 1413 (CA9 1987) (changed planes); *Craemer, supra*, at 595 (no luggage), with *United States v. Sanford*, 658 F.2d 342, 343 (CA5 1981), *cert. denied*, 455 U.S. 991, 102 S.Ct. 1618 (1982) (gym bag), with *Sullivan, supra*, at 12 (new suitcases); *United States v. Smith*, 574 F.2d 882, 883 (CA6 1978) (traveling alone), with *United States v. Fry*, 622 F.2d 1218, 1219 (CA5 1980) (traveling with companion); *United States Andrews*, 600 F.2d 563, 566 (CA6 1979), *cert. denied sub nom. Brooks v. United States*, 444 U.S. 878, 100 S.Ct 166 (1979) (acted nervously), with *United States v. Himmelwright*, 551 F.2d 991, 992 (CA5), *cert. denied* 434 U.S. 902, 98 S.Ct. 298 (1977) (acted too calmly). In asserting that it is not "somehow" relevant that the agents who stopped Sokolow did so in reliance on a prefabricated profile of criminal characteristics, the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.

-*Sokolow*, 490 U.S. 1, 109 S.Ct. at 1588-89.

The Maryland Court of Appeals improperly determined Sgt. Lewis had probable cause for the highly invasive search in the instant matter.

Absent a valid consent, probable cause is required for a warrantless search of an automobile. This Honorable Court has stated the "*Carroll*[24] doctrine" (which provides for the warrantless searches of automobiles) includes "a 'probing search' of compartments and containers within automobiles as long as the search ***is supported by probable cause.***" *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991), *quoting, United States v. Ross*, 456 U.S. 798 (1982). Probable cause is a practical, common sense decision whether, given all the circumstances..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In the instant case, the Maryland Court of Appeals concluded probable cause existed for the highly intrusive search of the vehicle Shaw was a passenger in because of Sgt. Lewis' observations of the van's ceiling and Petitioner and Nathan's suspicious behavior. (Pet. App. 71a).

Petitioner hereby asserts, Sgt. Lewis' hunch that the vehicle in question contained a hidden overhead compartment does not amount to probable cause,

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[24] *Carroll v. United States*, 267 U.S. 132 (1925).

when considered in conjunction with the factors used by the Maryland Court of Appeals to establish reasonable articulable suspicion, that such a compartment existed (and that the suspected compartment contained contraband). There was nothing facially unusual about the overhead compartment and panel that housed the television and video game systems. (Pet. App. 62a). Furthermore, all of the electronic equipment in the van was operational at the time of the stop in question. (Pet. App. 62a).

Petitioner states there is nothing unusual about the owner of a van refurbishing the vehicle by adding televisions, entertainment systems, etc. Common sense dictates if such a refurbished vehicle houses an entertainment system, the panel holding a television and entertainment system necessarily has to rigid and strengthened to hold said equipment. More importantly, any modification such as this would automatically presume space behind it to house the wiring and components.

The Maryland Court of Appeals, in finding the suspected presence of a compartment tipped the scales in favor of a finding of probable cause in the instant case, has essentially formulated a standard whereby any customization, alteration or upgrade to a vehicle will now constitute "a fair probability that contraband or evidence of crime will be found in a particular place" as long as a law enforcement says the passenger was extremely nervous and a strong odor of air

freshener was present (regardless of how many air fresheners are ultimately found). This standard offends any fundamental protection offered by the fourth Amendment to the United States Constitution because it places all manner of innocent drivers at risk for unwarranted governmental intrusion.

The Maryland Court of Appeals maintained, at least in part, Sgt. Lewis's probable cause was rooted in his past experience with hydraulic compartments. Part of this experience is Sgt. Lewis's discovery of an overhead compartment during the traffic stop of a separate van four (4) weeks before the vehicle Shaw was in was stopped. (Pet. App. 17a). By way of background, Sgt. Lewis discovered a compartment in the **modified front overhead console** of that vehicle during a traffic stop. As in the instant case, Sgt. Lewis tore out the overhead console and found a hidden compartment. In fact, during the stop in the present case Sgt. Lewis repeatedly makes reference to this van being "just like the last one."[25]

In this case, Sgt. Lewis, relying on the "training and experience" of the earlier stop, developed the hunch that all vans with newly customized overhead consoles must also contain secret compartments (and that all of these compartments must contain contraband). Following this hunch, Sgt. Lewis, used a

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[25] *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

claw hammer to try and tear down the front overhead console. When this hunch yielded nothing,[26] Sgt. Lewis, without further "training and experience" to rely on, began to tear down the panel and upholstery which housed the van's television and computer games. Shaw asserts herein any suspicions regarding hidden compartments that may have been justified by Sgt. Lewis's prior traffic stop, or any other factors in this case, completely dissipated after Sgt. Lewis tore down the front overhead console and found no compartment.

Even if this Honorable Court was to agree with the Maryland Court of Appeals that Sgt. Lewis did have probable cause prior to Sgt. Lewis' attempt to tear out the front console, which Shaw submits Sgt. Lewis did not, said probable cause did not exist afterward (before Sgt. Lewis discovered any contraband in a separate area).

Probable cause does not exist indefinitely in a vacuum. When Sgt. Lewis tore out a portion of the vehicle the Petitioner was a passenger in and did not

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[26] Sgt. Lewis was so sure he was going to find some contraband when he (Sgt. Lewis) tried to open this portion of the van that on the police video tape it is clear Sgt. Lewis could not believe it, because that is where Sgt. Lewis thought the compartment would be located. *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

discover a hidden compartment any probable cause ceased to exist. It is important to remember here, the initial reason for the intrusion in this matter was routine traffic stop for a violation of the traffic laws. This Honorable Court has stated such instructions must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See; Florida v. Royer*, 460 U.S. 491 (1983).[27]

As previously noted, probable cause is a practical, common sense decision whether, given all the circumstances..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). If Sgt. Lewis had developed probable cause, said probable cause ended when Sgt. Lewis tore out the front section of vehicle's ceiling. Obviously, Sgt. Lewis believed he would find a hidden compartment in this particular place in the vehicle. When Sgt. Lewis did not discover a compartment in this particular place, the search should have ended. Any legitimate reason for the continued intrusion in this matter had dissipated and more than a reasonable amount of time had expired to justify the purpose for the initial stop (ostensibly, to issue a traffic citation).

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[27] Petitioner certainly acknowledges seizures of this nature can be extended by a valid consent or the development of reasonable suspicion and/or probable cause.

In blessing Sgt. Lewis' continued dismantling of the vehicle the Petitioner was in, the Maryland Court of Appeals has disallowed the basis upon which all search and seizure law is predicated, reasonableness. Quite simply, it was unreasonable for Sgt. Lewis to continue his highly destructive and intrusive search of the vehicle Shaw was in after dismantling the front overhead section of vehicle's ceiling and finding no contraband. It was Sgt. Lewis, based upon the totality of the circumstances, applying his knowledge, training and experience, who determined a hidden compartment would be located in the front section of vehicle's ceiling, not the detainees. When Sgt. Lewis did not find a secret compartment in this are of the vehicle, all of his subsequent actions constituted nothing more than a fishing expedition not supported by probable cause.

Petitioner states permitting the continuation of searches in cases of this manner would subject all types of innocent citizens to protracted unreasonable seizures based upon nothing more than a hunch. Worse, no framework is established delineating when a seizure should appropriately end. Under the ruling of the Maryland Court of Appeals in the instant case, it is conceivable that once a search is initially justified by probable cause, it can continue indefinitely until the detaining officer is satisfied, with no protection, reasonable or otherwise, afforded to a detainee.

As the ultimate search that revealed contraband in the instant matter was unsupported by probable cause, it constituted an unreasonable search in violation of the Fourth Amendment and should not have been upheld by the Maryland Court of Appeals.

CONCLUSION

For the reasons stated herein, Petitioner respectfully represents a writ of certiorari should issue to review the judgment and opinion of the Maryland Court of Appeals.

Respectfully submitted

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